

Advisory Opinion 2000 - No. 2

Legislative/Campaign Website Linkages

The Board, on its own motion, has decided to submit this advisory opinion regarding whether an incumbent legislator's campaign Website may contain a hyperlink to a Legislative Internet homepage.

FACTS

The Washington State Legislature maintains an Internet homepage at www.leg.wa.gov. From that main homepage, users can access more specific information about the House, Senate, individual legislators, standing committees, caucuses, legislation, etc. by clicking on various hyperlinks. Posted on most of the individual legislators' pages are documents prepared by staff for legislative purposes, including copies of newsletters that were previously distributed via mail, press releases on legislative issues, an official photo, a biography, etc. The Senate Caucus homepages also contain video and audio clips with excerpts from legislators' speeches made in their official legislative capacity.

In their capacity as candidates for public office, many legislators have also established, without the use of any state resources, campaign websites.

QUESTION

May a legislator-candidate create a hyperlink from his or her campaign Website to materials prepared at public expense that are found on legislative Websites?

OPINION

Yes, however, only a single linkage may be provided. Additionally, after June 30th in an election year, discretionary materials prepared for specific legislators, such as newsletters, press releases, audio clips, and video clips, must be removed from legislative Websites.

ANALYSIS

RCW 42.52.180, Use of public resources for political campaigns, provides:

¹ A "hyperlink" allows a document to point to other documents or services available on the Internet. When activated, the hyperlink sends the user to the address of the host computer containing the website documents requested.

- (1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.
- (2) This section shall not apply to the following activities:
 - (a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;
 - (b) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;
 - (c) Activities that are part of the normal and regular conduct of the office or agency; and
 - (d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.
- (3) As to state officers and employees, this section operates to the exclusion of RCW 42.17.130.

The question raised in this advisory opinion appears to juxtapose two competing public policies, both of which were put in place by Washington voters. Namely, (1) ensuring that public

resources are not used for campaign purposes, as set forth above in RCW 42.52.180; and (2) providing liberal access to public records under the Public Records Act, RCW 42.17.270 et seq.

Historically, for other mediums, the House and Senate have balanced these two public policies.

For example, the House and Senate provide photos initially taken for legitimate legislative purposes to any member of the public, including legislator-candidates, for an administrative fee that covers the cost of materials and the legislative staff time allotted to produce a copy.² We view a hyperlink from a campaign Website to legislative Websites in a similar light. The materials found on legislative Websites are in the public domain for all to view. Anyone may create such a hyperlink, for any purpose.

In Advisory Opinion 1997 - No. 7, we provided that under limited circumstances prior to June 30th of an election year, legislators may go door-to-door with excess legislative newsletters. While there is a common perception that "doorbelling" is a campaign activity, we found that it could be "normal and regular conduct" under RCW 42.52.180(2)(c) for a legislator to go door-to-door to contact constituents for purposes of presenting legislative information and obtaining constituent opinions. Important to our reasoning in that case was that no materials should be prepared at public expense solely for doorbelling purposes.

A hyperlink from a campaign Website to an official legislative Website may create similar confusion about the proper use of public resources under RCW 42.52.180. Given that the site containing the proposed link would be created for an explicit campaign purpose, the use of legislative materials in such a context does not fairly fit any of the statutory exceptions in RCW 42.52.180(2), including (c), the "normal and regular conduct" exception. Nonetheless, in harmonizing RCW 42.52.180 with RCW 42.17.270, the Public Records Act, we conclude that legislators should be able to link to materials on legislative Websites, as other members of the public are.

Although we permit a link to materials on legislative Websites, consistent with the guidelines we set forth in Advisory Opinion 1997 -- No. 7, we also provide that after June 30th of an election year, for those legislators up for re-election, discretionary materials prepared specifically for them (e.g., newsletters, press releases, audio clips, and video clips) must be removed from legislative Websites.

We can also base our requirement that discretionary materials be removed under the election year mailing statute, RCW 42.52.185. In Advisory Opinion 1997 - No. 2, we analyzed

² Under the federal copyright law, a recipient of a single copy of a House or Senate public record would not in most cases be permitted to republish the copy without the express license of the Chief Clerk or Secretary. 17 U.S.C. §106 However, because there is undoubtedly a statutorily implied license to use public records for political purposes under the "fair use" doctrine, 17 U.S.C. §107, the Chief Clerk and Secretary are not placed in a position of having to knowingly acquiesce to the republishing of House and Senate records for a campaign purpose in violation of RCW 42.52.180.

legislative Websites under the election year mailing statute. We stated that placement of materials on a Website does not constitute "mailing" for purposes of the mailing statute, because Websites in general are "passive" means of communication, in that a viewer must take an affirmative action to receive the information provided on a Website. By contrast, legislative mailings via the post, e-mail, and fax, are active means of communication. However, a legislative Website, containing discretionary material like individual member newsletters, press releases, and video clips, loses its "passivity" as a communication medium for purposes of the ethics law when such a Website is linked from a legislator's campaign site.

Presumably a member of the public viewing a campaign Website has arrived there for the purpose of seeking campaign information. With a hyperlink, the legislative Website is now "one click away" from the campaign Website and has lost its character as a passive medium for purposes of the mailing statute. Since there are no effective means to control linkages from third party sites, we establish that after June 30th of an election year, those members up for election must have discretionary materials removed from the legislative Websites.